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Post Conviction Developments

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INTRODUCTION

The Post Conviction Relief Act¹ provides a procedure for defendants to collaterally challenge their conviction or sentence. The Act is the sole means² of obtaining collateral relief and has been broadly interpreted as creating a unified statutory framework for reviewing claims that were traditionally cognizable in habeas corpus.³ The Act permits defendants in custody⁴ to seek relief where the conviction or sentence resulted from one or more of the Act's specifically enumerated error or defects⁵ and the claimed error has not been waived⁶ or previously litigated⁷ on appeal or in a previous petition under the Act. Subject to several narrow exceptions, a petition under the Act must be filed within one year of the date the defendant's judgment becomes final.⁸ This article reports on a number of recent decisions of the Pennsylvania Supreme and Superior Court construing provisions of the Act.

REINSTATEMENT OF PCRA APPEAL RIGHTS *NUNC PRO TUNC*

Where counsel fails to file a direct appeal requested by the defendant, the PCRA provides the exclusive remedy to seek reinstatement of the right to direct appeal.⁹ The PCRA also provides a basis for relief where the opportunity to seek discre-

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1. 42 Pa.C.S. §9541 *et seq.*

2. 42 Pa.C.S. §9542.

3. *Commonwealth v. Ahlborn*, 699 A.2d 718, 721 (Pa. 1997); *Commonwealth v. Chester*, 733 A.2d 1242, 1250-1251 (Pa. 1999).

4. 42 Pa.C.S. §9543(a)(1).

5. 42 Pa.C.S. §9543(a)(2).

6. 42 Pa.C.S. §9543 (a)(4), 9544(b).

7. 42 Pa.C.S. §9544(a).

8. 42 Pa.C.S. §9545(b).

9. *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999). Reinstatement of direct appeal rights is not the proper remedy where appellate counsel perfects direct appeal but fails to raise certain claims that the defendant claims should have been raised. Where the defendant was not entirely denied his right to direct appeal, the PCRA court should determine whether appellate counsel was ineffective in waiving one or more issues on direct appeal. *See e.g., Commonwealth v. Grosella*, 902 A.2d 1290 (Pa. 2006).

tionary review is lost because of ineffectiveness of counsel.¹⁰ In both cases, the defendant must file a timely post-conviction petition.¹¹ In the context of PCRA proceedings, a defendant has an enforceable right pursuant to Pa.R.Crim.P. 904 to effective post conviction counsel¹² in the PCRA court and on appeal from the denial of collateral relief.¹³ Prior to the Pennsylvania Supreme Court's 2003 decision in *Commonwealth v. Robinson*,¹⁴ when a defendant filed a second untimely petition seeking to restore his right to appeal the denial of PCRA relief where the appeal had been quashed because of counsel's failure to file a brief, the Superior Court construed the untimely petition as an "extension"¹⁵ of the timely, but previously dismissed first petition. *Robinson* rejected the "extension theory" holding that where an appeal is taken from the denial of a timely first petition, but the Superior Court dismisses the appeal on the basis of lawyer error,¹⁶ a second petition to restore the defendant's right to appeal must be filed within the one-year time period under the Act.¹⁷ The court held that ineffectiveness of counsel did not excuse an otherwise untimely PCRA petition.¹⁸

The PCRA provides a forum for a defendant to establish that counsel's acts or omissions deprived him of his constitutional or rule-based right to effective counsel.

*Commonwealth v. Bennett*¹⁹ was pending in the Superior Court when *Robinson* was decided. In *Bennett*, the Superior Court dismissed the defendant's untimely second petition that sought reinstatement of the right to appeal the denial of PCRA relief that was lost because of lawyer error²⁰ on grounds that the defendant failed to plead and prove the subsection (b)(1)(ii) exception²¹ to the one-year filing period.²² On appeal, the Pennsylvania Supreme Court initially concluded that it could review whether Bennett's untimely petition met the requirements of the exception to the one-year filing period because Bennett had relied upon the process established by the Superior Court which afforded defendants *nunc pro tunc* relief under the extension theory.²³

10. *Commonwealth v. Liebel*, 825 A.2d 630 (Pa. 2003) (where counsel fails to file a petition for allowance of appeal after assuring the defendant he would do so, provided that counsel believes that the claims the defendant would raise in the petition are non-frivolous, the defendant is not required to establish in the PCRA proceeding that the Supreme Court would have granted review of the defendant's claims).

11. *Commonwealth v. Hall*, 771 A.2d 1232 (Pa. 2001).

12. *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1999).

13. Pa.R.Crim.P. 904 (F)(2).

14. 837 A.2d 1157 (Pa. 2003).

15. *Commonwealth v. Leasa*, 759 A.2d 941 (Pa. Super. 2000); *Commonwealth v. Peterson*, 756 A.2d 687 (Pa. Super. 2000).

16. Since *Robinson*, the Superior Court has adopted an informal practice of no longer dismissing appeals without prejudice because of counsel's failure to file a brief. Instead, the court retains jurisdiction and remands for the appointment of new counsel. *Commonwealth v. Bennett*, 930 A.2d 1264, 1274, n.12 (Pa. 2007).

17. 42 Pa.C.S.A. §9545(b).

18. See *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780 (Pa. 2000).

19. 930 A.2d 1264 (Pa. 2007).

20. PCRA court appointed the defendant's prior trial counsel to represent Bennett on his PCRA appeal notwithstanding the fact that Bennett had claimed in his PCRA petition that trial counsel was ineffective. The appeal was dismissed due to counsel's failure to file a brief.

21. 42 Pa.C.S.A. §9545 (b)(1)(ii). The exception provides relief from the one-year filing period if the defendant establishes that "the facts upon which the claim is predicted were unknown to the petitioner and could not have been ascertained by the exercise of due diligence. . . ."

22. Instead of alleging and proving an exception to the one-year time limitation in his PCRA petition, the defendant relied upon the extension theory in his original and amended petitions. He first raised the subsection (b)(1)(ii) exception in his brief before the Supreme Court.

23. The court concluded that the defendant had timely asserted the exception by filing the petition less than twenty-five days after he learned the Superior Court had dismissed his first PCRA appeal. 930 A.2d

Turning to the subsection (b)(1)(ii) exception to the filing period, the *Bennett* court noted that it had erroneously referred to the subsection in prior decisions as the “after-discovered evidence” exception to the one-year filing period and that it had incorrectly engrafted *Brady v. Maryland*²⁴ considerations into its analysis of the exception. The court held that the exception “does not contain the same requirements as a *Brady* claim.”²⁵ Instead, the subsection (b)(1)(ii) exception to the one-year filing period simply requires a defendant to allege and prove that “the facts upon which the claim was predicated were unknown” and “could not have been ascertained by the exercise of due diligence.”²⁶ The court held that its prior case law²⁷ holding that ineffectiveness of counsel could not be invoked as a newly discovered “fact” for purposes of the exception does not apply when the claim of lawyer error constitutes a “complete denial of counsel.”²⁸ Noting that the Statutory Construction Act required it to presume that the General Assembly did not intend to violate the United States or Pennsylvania Constitutions in enacting the PCRA, the court held that while the PCRA is not part of the criminal process, due process nonetheless requires that “the post conviction process be fundamentally fair.”²⁹ Application of the prior case law to situations where, as here, counsel abandons his client on appeal would, the court held, “raise serious questions of whether the [PCRA] process is ‘fundamentally fair’ . . .”³⁰ While the court was satisfied that the defendant had made sufficient allegations to invoke subsection (b)(1)(ii), the case was remanded for proof that the facts were “unknown” to the defendant and that he could not have uncovered them with the exercise of “due diligence.”

In *Commonwealth v. Brown*,³¹ as in *Bennett*, counsel wholly abandoned his client but in *Brown*, the Pennsylvania Supreme Court concluded that the defendant was not entitled to PCRA relief. Following conviction and sentence, Brown obtained new counsel who indicated his intention to file written post-sentence motions but never filed the motions. Eleven months after sentencing, the trial court issued an order purporting to deny the post-sentence motions. Six days later, Brown filed a notice of appeal which was quashed as untimely by the Superior Court a year later. Within a year of the Superior Court’s action, Brown sought PCRA relief reinstating his right to direct appeal *nunc pro tunc*. In the PCRA court, the defendant did not allege and prove an exception to the one-year time limitation and the Commonwealth did not challenge the timeliness of the petition. Rather, it stipulated that defendant’s direct appeal counsel was ineffective in failing to file a timely post-sentence motion or notice of appeal. The PCRA court reinstated the defendant’s right to direct appeal but the Superior Court quashed the appeal. The court held that the PCRA court lacked jurisdiction to reinstate the defendant’s direct appeal rights because his PCRA pe-

at 1272 n.11. In a post-*Bennett* case, *Commonwealth v. Geer*, 936 A.2d 1075 (Pa. Super. 2007), the Superior Court held that the PCRA court did not have jurisdiction to grant the defendant’s request to file an appeal *nunc pro tunc* because the defendant failed to establish that he presented his claim within sixty days of when he learned that the Superior Court had dismissed his appeal due to counsel’s failure to file an appellate brief.

24. 373 U.S. 83 (1963).

25. 930 A.2d at 1271.

26. 42 Pa.C.S. §9545 (b)(1)(ii).

27. See e.g., *Commonwealth v. Gamoa-Taylor*, 753 A.2d 780, 785 (Pa. 2000); *Commonwealth v. Purcell*, 749 A.2d 911, 916 (Pa. 2000); *Commonwealth v. Crews*, 863 A.2d 498 (Pa. 2004). The court noted the distinction between cases such as the above where counsel allegedly ineffectively narrowed the claims raised on appeal and where counsel abandons his client for purposes of appeal. In the later cases, the court notes, prejudice is presumed. See *Commonwealth v. Halley*, 870 A.2d 795 (Pa. 2005); *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999).

28. 930 A.2d at 1273.

29. *Id.* at 1273.

30. *Id.* at 1274.

31. 943 A.2d 264 (Pa. 2008).

tion was not filed within one-year of the date the judgment became final. The Superior Court noted but did not apply the Pennsylvania Supreme Court's decision in *Commonwealth v. Murray*³² and the Superior Court's opinion in *Commonwealth v. Mazzarone*.³³ In both cases, the court calculated the commencement of the one-year filing period from the disposition of the untimely-filed notice of appeal.

In the Supreme Court, the defendant argued that by the time counsel's omission was discovered, the one-year time period to file a PCRA petition had already expired and urged the court to apply *Murray*. In affirming the Superior Court's dismissal of the appeal, the Supreme Court stated that its language in *Murray* that the one-year filing period commenced thirty days after an untimely appeal was quashed by the Superior Court was incorrect as it conflicted with the language in Section 9545 of the Act which provides that a judgment of sentence becomes final "at the expiration of the time for seeking . . . review" where direct review is unavailable. Because the error in *Murray* was not significant to the outcome of that case, the court concluded that the language was dictum and thus did not have the effect of precedent. While the court acknowledged the defendant's equitable arguments,³⁴ the court restated that there is "no generalized equitable exception to the jurisdictional one-year time bar. . . ."³⁵ Because the defendant did not allege and prove an exception to the one-year filing period, he was not entitled to relief restoring his right to direct appeal.³⁶

In *Commonwealth v. Liston*,³⁷ the Superior Court returned to the issue of the role of the PCRA court when the defendant alleges ineffectiveness of both trial counsel and appellate counsel in failing to file a requested direct appeal. The Superior Court had addressed the issue in *Commonwealth v. Miranda*³⁸ decided in 1982, and the issue before the court in *Liston* was whether the *Miranda* approach remained workable in light of the Supreme Court's subsequent decision in *Commonwealth v. Grant*.³⁹ In *Miranda*, the court held that when a defendant raises multiple issues in a post-conviction petition including a claim that counsel failed to file a timely appeal and the post-conviction court grants the defendant the right to appeal *nunc pro tunc*, the post-conviction court is required to complete the record with respect to other claims raised in the petition, including claims of ineffectiveness of trial counsel, in order for those issues to be reviewed in the *nunc pro tunc* direct appeal. *Liston* noted that *Miranda* was decided when claims of ineffectiveness of trial counsel were deemed waived unless raised by new counsel at the first opportunity, even if that first opportunity was direct appeal and the issue had not been presented by way of post-sentence motion to the trial court.⁴⁰ In *Commonwealth v. Grant*⁴¹ this long standing rule was overruled. *Grant* holds that as a general rule, claims of ineffectiveness of trial counsel would no longer be considered on direct appeal but deferred to the post-conviction process. *Liston* noted that following *Grant*, the Pennsylvania

32. 753 A.2d 201 (Pa. 2000).

33. 856 A.2d 1208 (Pa. Super. 2004).

34. The court citing *Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007) noted that it had recognized the potential availability of an "as applied constitutional challenge to the application of the PCRA's time restriction" but that the defendant had raised no such argument in the present appeal.

35. *Commonwealth v. Brown*, 943 A.2d at 267.

36. In a dissenting opinion, Justice Baer was of the view that the defendant was entitled to relief under *Murray*. In addition, the dissent addressed "the slow erosion of rights once protected by the writ of *habeas corpus*" and argued that the "PCRA simply is an inadequate device to address constructive abandonment of counsel when it leads to complete forfeiture of direct appellate rights" and that such a claim should be subject to review under *habeas corpus*. *Commonwealth v. Brown*, 943 A.2d at 278.

37. 941 A.2d 1279 (Pa. Super. 2008).

38. 442 A.2d 1133 (Pa. Super. 1982).

39. 813 A.2d 726 (Pa. 2002).

40. *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977).

41. 813 A.2d 726 (Pa. 2002).

Supreme Court in *Commonwealth v. Bomar*⁴² held that *Grant* did not apply when defendant's claims of ineffectiveness were properly raised by new counsel in post-sentence motions and the trial court heard testimony of trial counsel and addressed the ineffectiveness claims in an opinion.⁴³ In *Liston*, the court concluded that the concerns in *Miranda* with respect to judicial economy and efficiency remained valid notwithstanding *Grant*. *Liston* holds that if the PCRA court reinstates a defendant's right to direct appeal *nunc pro tunc*, the PCRA court shall also reinstate the defendant's right to file post-sentence motions or amended post-sentence motions *nunc pro tunc*, thereby allowing the defendant to raise any issue of trial counsel ineffectiveness. If such a claim is raised, the PCRA court "can hold an evidentiary hearing, if warranted, perfect the record for review, and reach a final decision on the merits."⁴⁴ This procedure permits the Superior Court, consistent with *Bomar*, to "review the appellant's ineffectiveness claims on the ensuing direct appeal"⁴⁵ thereby "preserv[ing] valuable judicial time and resources, and save[ing] the appellant from having to file another, duplicative PCRA petition raising the identical claims later in the process."⁴⁶

INEFFECTIVENESS AND THE ROLE OF STANDBY COUNSEL

It is settled law that a defendant who knowingly and intelligently waives his right to counsel in order to exercise his right to self-representation may not later rely upon his own ineffectiveness as grounds for a new trial.⁴⁷ Less settled is whether a defendant proceeding *pro se* can challenge the effectiveness of stand-by counsel.⁴⁸ The claim has been recognized in a number of jurisdictions.⁴⁹ In two capital cases decided in the 1990's, the Pennsylvania Supreme Court held that the defendants were not entitled to relief based upon claims of ineffectiveness of stand-by counsel but nonetheless reviewed the claims given the irrevocable nature of the penalty.⁵⁰

The issue was addressed again by the Pennsylvania Supreme Court in two recent capital cases. In contrast to the earlier cases, the Court did not review the claims of

42. 826 A.2d 831 (Pa. 2003).

43. In *Commonwealth v. May*, 887 A.2d 750 (Pa. 2005), the court concluded that the *Bomar* exception did not apply where a claim of ineffectiveness was raised for the first time in the defendant's Pa.R.App.P. 1925(b) statement as the trial court had not held an evidentiary hearing at which trial counsel testified.

44. *Commonwealth v. Liston*, 941 A.2d at 1285.

45. *Id.*

46. *Id.*

47. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). See also *Commonwealth v. Griffin*, 644 A.2d 1167, 1171 (Pa. 1994); *Commonwealth v. Szuchon*, 484 A.2d 1365, 1377 (Pa. 1984).

48. In *Faretta*, the Court stated that stand-by counsel could be appointed to "aid the accused if and when the accused requests help . . ." The Court also noted that a trial court could appoint stand-by counsel "even over the objection of the accused . . ." 422 U.S. at 834 n.46. See also *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (appropriate for trial court to appoint "stand-by" counsel to "steer defendant through the basic procedures of the trial").

49. See e.g., *State v. Richards*, 552 N.W. 2d 197 (Minn. 1996) (standby counsel should be governed by some standard of effective assistance consistent with the stand-by role); *People v. Bloom*, 774 P.2d 698, 718 (Cal. 1989) ("To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently within the limited scope of the duties assigned to or assumed by counsel. . . ." (*emphasis omitted*)); *Ali v. United States*, 581 A.2d 368, 379-80 (D.C. Cir. 1990) (same); *Downey v. People*, 25 P.3d 1200, 1204 (Colo. 2001); *State v. Thomas*, 417 S.E. 2d 473, 478 (N.C. 1992). See also Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U.L. Rev. 676, 725-735 (2000).

50. *Commonwealth v. Griffin*, 644 A.2d 1167, 1171 (Pa. 1994) (adopting position of Superior Court that defendant cannot challenge performance of stand-by counsel; *Commonwealth v. Appel*, 689 A.2d 891, 906 (Pa. 1997). In *Commonwealth v. Davis*, 388 A.2d 324 (Pa. 1978), the court dismissed the defendant's claim that stand-by was ineffective by noting that the defendant had only minimally conferred or requested advice from stand-by counsel. See also *United States v. Milolajczyk*, 137 F.3d 237, 246 (5th Cir. 1998); *United States v. Schmidt*, 105 F.3d 82, 89-91 (2nd Cir. 1997); *State v. Oliphant*, 702 A.2d 1206, 1212-13 (Conn. App. Ct. 1997).

ineffectiveness of stand-by counsel. In *Commonwealth v. Bryant*,⁵¹ counsel represented the defendant during pre-trial proceedings but once the jury was selected, the defendant invoked his right to self-representation and represented himself through most of the Commonwealth's case with counsel serving as stand-by counsel. Later, the defendant relinquished his right to self-representation and stand-by counsel resumed primary representation. In an appeal from the denial of PCRA relief, the defendant claimed stand-by counsel failed to take appropriate steps to protect the defendant from evidentiary errors and prosecutorial misconduct and that such failures deprived the defendant of his right to effective stand-by counsel. In affirming the denial of PCRA relief, the Supreme Court held that once the defendant waived his right to counsel and asserted his right to self-representation, he could not "bootstrap from his own failure to raise [a] claim by blaming counsel for failing to remedy his own mistake"⁵² and consequently, the court would not "consider any ineffectiveness claims that arise from the period of self-representation."⁵³ In a dissenting opinion, Justice Saylor faulted the majority for refusing to consider the defendant's claim that standby counsel failed to adequately perform the limited role assigned to him by the trial court stating that such failure "can implicate errors of constitutional dimension."⁵⁴

Bryant was followed in *Commonwealth v. Fletcher*.⁵⁵ In *Fletcher*, the defendant elected to proceed *pro se* and the court appointed standby counsel after post-verdict motions were filed. Following the denial of post-verdict motions, new counsel was appointed for direct appeal. After the defendant's conviction and death sentence were affirmed on appeal, defendant asserted in a post conviction proceeding that trial counsel was ineffective for failing to call as a witness the pathologist who performed the autopsy. The PCRA court granted the defendant a new trial rejecting the Commonwealth's contention that the issue of trial counsel's ineffectiveness was waived because the defendant proceeded *pro se* on post-verdict motions and failed to raise the issue at that time or on direct appeal. In vacating the PCRA court's order, the Pennsylvania Supreme Court concluded the defendant's self-representation at post-verdict motions "precluded future claims of ineffective assistance of trial counsel."⁵⁶ In a footnote, the court noted that it was following the categorical approach it had adopted in *Commonwealth v. Bryant*,⁵⁷ in refusing to consider any claims of ineffectiveness arising from a period of self-representation including the performance of stand-by counsel.⁵⁸

WITHDRAWAL BY PCRA COUNSEL

Withdrawal by counsel on direct appeal is governed by the United States Supreme Court's decision in *Anders v. California*.⁵⁹ *Anders* requires counsel seeking to withdraw to file an advocates brief "referring to anything in the record that might arguably support the appeal"⁶⁰ with a copy to the defendant allowing for adequate time for the defendant to raise any arguments he chooses. In *Pennsylvania v. Finley*,⁶¹ the United States Supreme Court held that the requirements set forth in *Anders* are not applicable when counsel seeks to withdraw in a post-conviction proceeding.

51. 855 A.2d 726 (Pa. 2004).

52. *Id.* at 740.

53. *Id.* at 737.

54. *Id.* at 752 (Saylor, J. dissenting).

55. 896 A.2d 508 (Pa. 2006).

56. 896 A.2d at 551.

57. 855 A.2d 726 (Pa. 2004).

58. 896 A.2d at 551 fn.13.

59. 386 U.S. 738 (1967).

60. *Id.* at 744.

61. 481 U.S. 551 (1987).

Following *Finley*, in *Commonwealth v. Turner*,⁶² the Pennsylvania Supreme Court established the procedure for counsel to withdraw when counsel, appointed or retained, determines that the issues presented in the post-conviction petition are without merit. The court held that counsel seeking to withdraw must submit, in conjunction with a motion to withdraw, a “no-merit” letter detailing the nature and extent of counsel’s review of the issues. The “no-merit” letter shall list each issue the defendant wishes to pursue, and an explanation of why the issue is without merit. *Turner* requires that the court conduct its own independent review of the record and agree with counsel that the petition is without merit before permitting counsel to withdraw. The *Turner* procedure applies to withdrawal in the PCRA court and on appeal.

In *Commonwealth v. Friend*,⁶³ the Superior Court expanded counsel’s duties in seeking to withdraw in a PCRA proceeding. *Friend* requires that counsel must provide the defendant notice of counsel’s intent to withdraw by contemporaneously serving the defendant with a copy of the application to withdraw, a copy of the “no-merit” letter and a statement advising the defendant that if the court grants the application to withdraw, the defendant may proceed *pro se* or with the assistance of privately retained counsel.⁶⁴

COLLATERAL REVIEW AND THE DEFINITION OF MENTAL RETARDATION

In *Adkins v. Virginia*,⁶⁵ the United States Supreme Court held that the Eighth Amendment prohibited the execution of mentally retarded persons. The Court left the determination of how to apply the prohibition to the individual states. In *Commonwealth v. Miller*,⁶⁶ the Pennsylvania Supreme Court set out the procedure for the resolution of an *Adkins* claim on collateral review.⁶⁷ The court held that the defendant must establish mental retardation by a preponderance of the evidence using either the definition of mental retardation developed by the American Association of Mental Retardation⁶⁸ or the definition in the Diagnostic and Statistical Manual of Mental Disorders.⁶⁹ These definitions require a defendant to establish limited intellectual functioning, significant adoptive limitations, and age of onset. The court held that there was no “cutoff IQ.”⁷⁰ Rather, it was the “interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”⁷¹ Finally, the court rejected the use of the definition of mental retardation in the Pennsylvania Mental Health and Retardation Act⁷² (“MHMRA”) noting that the definition in that Act “may be appropriate when the diagnosis is for something other than penological interests.”⁷³

Reaffirming its decision in *Miller* in *Commonwealth v. Crawley*,⁷⁴ the court again rejected the MHMRA standard of mental retardation. It next turned to the level of

62. 544 A.2d 927 (Pa. 1988).

63. 896 A.2d 607 (Pa. Super. 2006).

64. The notice requirement mandated by *Friend* specifically addresses due process concerns raised by the dissent in *Pennsylvania v. Finley*, 481 U.S. 551, 562 (1987) (Brennan, J., dissenting).

65. 536 U.S. 304 (2002).

66. 888 A.2d 624 (Pa. 2005).

67. The court noted that because *Miller* involved the procedure for the resolution of a claim of mental retardation on collateral review, it did not need to reach the question of whether mental retardation is to be resolved by a judge or jury at trial.

68. Mental Retardation: Definition, Classification, and Systems of Supports 1 (10th ed. 2002).

69. Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992).

70. *Commonwealth v. Miller*, 888 A.2d at 631.

71. *Id.*

72. 50 P.S. §4102.

73. *Commonwealth v. Miller*, 888 A.2d at 631.

74. 924 A.2d 612 (Pa. 2007).

deference given to a PCRA's courts determination of mental retardation. The court noted that whether a defendant meets either of the definitions adopted in *Miller* is a mixed question of law and fact and that the standard for reviewing such questions was not settled in Pennsylvania. Concluding that a highly deferential standard was appropriate because the definition of mental retardation is fact intensive, the court held that the standard of review is "whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous."⁷⁵

INEFFECTIVENESS AND CAPITAL SENTENCING

The United States Supreme Court first addressed the issue of counsel's obligation to investigate and present evidence of mitigation at capital sentencing in *Strickland v. Washington*.⁷⁶ In *Strickland*, the Court established a two-part performance and prejudice standard⁷⁷ that governs claims of ineffectiveness of counsel. With respect to counsel's duty to investigate evidence of mitigation, the Court in *Strickland* stated that "counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."⁷⁸ Where counsel decides as a tactical matter not to investigate or to limit the scope of investigation into potential mitigating evidence, the decision will be "directly assessed for reasonableness in all the circumstances. . . ."⁷⁹

In recent cases applying *Strickland*, the United States Supreme Court has found counsel ineffective at capital sentencing. In *Williams v. Taylor*,⁸⁰ the Court concluded that counsels' failure to discover and present mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not "fulfilled their obligation to conduct a thorough investigation of the defendant's background."⁸¹ In *Wiggins v. Smith*,⁸² the Court concluded that counsels' decision not to expand their investigation beyond the PSI and the defendant's social service records was not reasonable in light of evidence in the social service records—"evidence that would have lead a reasonably competent attorney to investigate further."⁸³ And in *Rompilla*

75. *Commonwealth v. Crawly*, 924 A.2d at 617.

76. 466 U.S. 668 (1984).

77. "First, the defendant must show that counsel's performance was deficient. This requires showing counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is unreliable." *Strickland v. Washington*, 466 U.S. at 693. Although the test for determining ineffectiveness is the same under both the Pennsylvania and United Sates Constitution, Pennsylvania courts use a three-prong standard that requires the defendant to demonstrate that (1) the issue underlying the claim of ineffectiveness has arguable merit, (2) counsel did not have a reasonable basis for the act or omission in question, and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceeding would have been different. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987).

78. *Strickland v. Washington*, 466 U.S. at 695. In *Strickland*, the defendant claimed counsel was ineffective in failing to request a psychiatric examination and to present evidence of the defendant's character and emotional state. The Court disagreed finding counsel's decision not to seek additional character or psychological evidence reasonable as "counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help" and that restricting testimony to what had already been presented at the plea colloquy ensured that "contrary character and psychological evidence" would not come in at the sentencing hearing. *Id.* at 701. See also *Burger v. Kemp*, 483 U.S. 776 (1987) (while noting that counsel could have made a more thorough investigation, counsel not ineffective for failure to discover and introduce evidence concerning the defendant's unstable childhood as decision to not investigate further based upon reasonable professional judgment that such evidence may have harmed the defendant as much as it might have helped him).

79. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

80. 529 U.S. 362 (2000).

81. *Williams v. Taylor*, 529 U.S. at 396.

82. 539 U.S. 510 (2003).

83. *Id.* at 534.

v. *Beard*,⁸⁴ the Court concluded that counsel's investigation fell below the *Strickland* standard because (1) counsel failed to examine the court file on defendant's prior conviction which counsel knew the prosecution would rely in establishing defendant's history of violence; and (2) the prior conviction file contained a "range of mitigation leads"⁸⁵ including prison files which described the defendant's "childhood and mental health very differently from anything defense counsel had seen or heard"⁸⁶ from other sources.

In a number of recent post-conviction appeals, the Pennsylvania Supreme Court has addressed claims that capital counsel was ineffective in failing to investigate and present mitigation evidence. In *Commonwealth v. Sneed*,⁸⁷ the post-conviction court granted the defendant a new penalty hearing after concluding that counsel did not have a reasonable basis for not developing and presenting evidence of mitigation. In affirming the PCRA court, the court found that counsel had failed to "conduct even a cursory investigation" into defendant's background.⁸⁸ Counsel had not taken social history from the defendant or obtained defendant's prison, probation records or prior mental health evaluations. Nor did counsel have the defendant evaluated by a mental health expert. The court found that had counsel conducted a reasonable investigation, counsel would have discovered "significant mitigation evidence"⁸⁹ concerning defendant's background, character and mental state. Relief was warranted, the court concluded, because counsel's failure to investigate and develop mitigation evidence was not "an objectively reasonable strategy"⁹⁰ and had the jury heard the mitigation evidence presented at the PCRA hearing, "there is a reasonable probability that at least one juror would have struck a different balance and voted not to impose the death penalty."⁹¹

Post-conviction relief in the form of a new penalty hearing was also granted in *Commonwealth v. Gorby*.⁹² In *Gorby*, the PCRA court denied relief notwithstanding trial counsel's testimony that "he had no strategic or tactical reason for not developing life-history, mental-health and other mitigation evidence."⁹³ In reversing the PCRA court, the court concluded that trial counsel "inappropriately limited his investigation to the acquisition of rudimentary information from a narrow set of sources".⁹⁴ The information counsel did obtain "should have prompted additional investigation"⁹⁵ that might have lead to additional mitigation evidence. In light of counsel's testimony, the court found "no reasonable strategy"⁹⁶ supporting counsel's limited investigation. The court specifically rejected the PCRA court's suggestion that granting the defendant a new sentencing hearing would indicate that in all

84. 545 U.S. 374 (2005).

85. *Rompilla v. Beard*, 545 U.S. at 390.

86. *Id.*

87. 899 A.2d 1067 (Pa. 2006).

88. Counsel did not present any testimonial evidence of mitigation at the sentencing hearing.

89. 899 A.2d at 1080.

90. In *Commonwealth v. Rios*, 920 A.2d 790, 812 (Pa. 2007), the court rejected the defendant's post-conviction claim that trial counsel was ineffective in failing to introduce two mental health reports and for failing to investigate information contained in the reports regarding the defendant's mental health. The court based its assessment of counsel's effectiveness on the testimony of counsel that he chose to limit mental health testimony to a stipulation that the defendant had been diagnosed as schizophrenic and that relying on the stipulation was a "strategic consideration" to put the diagnoses before the jury while preventing the Commonwealth from using adverse information in the reports in its favor.

91. *Id.* at 1084

92. 900 A.2d 346 (Pa. 2006).

93. *Id.* at 352. The PCRA court concluded that counsel was not ineffective because counsel had spoken at length with the defendant's mother and was not informed about any mental health problems or abuse and that the defendant had not displayed any overt sign of a mental health problem.

94. *Id.* at 362

95. *Id.*

96. *Id.*

capital cases counsel must present mental health mitigation evidence to avoid a later finding of ineffectiveness. Relief was warranted here, the court stated, because the “sum total of the individualized circumstances” reflected evident failures on the part of trial counsel to provide “constitutionally effective representation at the penalty phase of the trial . . .”⁹⁷

In *Commonwealth v. May*,⁹⁸ the defendant sought PCRA relief on grounds that appellate counsel⁹⁹ were ineffective in failing to raise on appeal the trial court’s ruling that evidence of childhood abuse was not relevant mitigation evidence.¹⁰⁰ In a plurality decision, the court held that the defendant was entitled to a new sentencing hearing. The court concluded that because evidence of childhood abuse is admissible at capital sentencing and counsel did not have reasonable basis for not presenting the issue on appeal,¹⁰¹ the defendant had satisfied the first two prongs of the standard governing claims of ineffectiveness. With respect to prejudice, the third prong of the standard, three members of the court concluded that because the jury had found only one aggravating circumstance and no mitigating circumstances, had evidence of childhood abuse been presented, there was a reasonable probability that the jury would have reached a different result. Three other members of the court focusing not on the jury but on the appellate court, concluded that had the issue of the trial court’s ruling barring mitigation evidence been presented on appeal, there was a reasonable probability that the court would have remanded the case for a new sentencing hearing.

Three additional capital cases involving claims that the counsel was ineffective in failing to develop mitigation evidence were remanded by the Pennsylvania Supreme Court to the PCRA court. In *Commonwealth v. Jones*,¹⁰² trial counsel called no witnesses and presented no evidence at Jones’ penalty hearing. The PCRA court found that there was substantial mental health evidence and other information available at the time of trial that should have investigated and that counsel offered no strategic reason for failing to do so. As a result, the PCRA court concluded that there was a “substantial likelihood that the outcome of the penalty hearing would have been different” had the mitigation evidence been admitted. The Supreme Court agreed that the defendant had established ineffectiveness of trial counsel but held that a remand was necessary under *Commonwealth v. McGill*.¹⁰³ As noted above, in cases where direct appeal was filed before *Commonwealth v. Grant*, and ineffectiveness of trial counsel was not presented on direct appeal, *McGill* holds that the only viable post-conviction claim is one of appellate counsel ineffectiveness. A defendant must first establish the ineffectiveness of trial counsel which satisfies the arguable merit prong of appellate counsel’s ineffectiveness. While Jones established that trial counsel was ineffective, a remand was required to determine whether

97. *Id.* at 363. Direct appeal in Gorby was concluded prior to the court’s decision in *Commonwealth v. Grant*, 813 A.2d 726 (2002). As a result, the issue before the court was whether appellate counsel ineffective for failing to raise the issue of trial counsel’s ineffectiveness. The court found no reasonable strategy on the part of appellate counsel in failing to raise the issue of trial counsel ineffectiveness.

98. 898 A.2d 559 (Pa. 2006).

99. The defendant was represented on appeal by the same attorneys who represented him in the trial court.

100. The defendant sought to present evidence regarding abuse by his father pursuant to 42 Pa.C.S. § 9711(e)(8) which includes as mitigating evidence “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.”

101. Counsel testified at the PCRA hearing that he did not have a reasonable basis for the not raising on appeal the trial court’s ruling preventing the introduction of evidence of childhood abuse. Because of this admission, other than noting the issue, the court was not required to decide whether appellate counsel can forgo presenting arguably meritorious claims in favor of claims which counsel believes have a better chance of resulting in a favorable appellate court ruling. See *Commonwealth v. Jones*, 815 A.2d 598, 613 (Pa. 2003).

102. 912 A.2d 268 (Pa. 2006).

103. 680 A.2d 1131 (Pa. 1996).

appellate counsel had a reasonable basis for failing to argue that trial counsel was ineffective for failing to investigate and present mitigation evidence and whether appellate counsel's failure to do so was prejudicial.

In *Commonwealth v. Carson*¹⁰⁴ and *Commonwealth v. Rainey*,¹⁰⁵ the PCRA courts denied relief without holding an evidentiary hearing in which trial counsel testified. In *Garson*, the PCRA court concluded that trial counsel had no reason to suspect the defendant had cognitive defects and that the witnesses who testified at the penalty hearing did not support the post-conviction claim that the defendant was raised in an unstructured family. In remanding the case for an evidentiary hearing, the Supreme Court stated that the "key to our evaluation of counsel's investigation is not focused on whether counsel should have presented a mitigation case or specific evidence, but rather questions whether the investigation supporting counsel's decision not to present a particular mitigation case or evidence was reasonable."¹⁰⁶ In *Rainey*, the PCRA court denied relief because the defendant had not alleged that trial counsel was aware of his history of brain damage and psychological impairments. In addition, the PCRA court "surmised" that counsel did not present mental health mitigation evidence in an effort to keep the jury from learning that the defendant was unable to control himself. The Supreme Court rejected the reasoning of the PCRA court because trial counsel did not testify in the PCRA court and "explain why he did not conducted an investigation."¹⁰⁷ The case was remanded for an evidentiary hearing to allow the defendant the opportunity to challenge the reasonableness of counsel's actions.

INEFFECTIVENESS AND WAIVER OF JURY TRIAL

In *Commonwealth v. Mallory*,¹⁰⁸ the Pennsylvania Supreme Court considered the issue of prejudice in the context of a claim that trial counsel was ineffective because he did not object to the trial court's failure to conduct an on-the-record oral jury waiver pursuant to Pa.R.Crim. P. 620. In the PCRA court, the defendants testified that although they signed written waivers, they would have exercised their right to a jury trial if the trial court had conducted an oral colloquy. The PCRA court's grant of a new trial was reversed by the Superior Court on grounds that the defendants had failed to establish that the outcome of their joint trial would have been different if it had been conducted before a jury.¹⁰⁹ In reversing the Superior Court and remanding the case to the PCRA court, the court held that the absence of an oral waiver colloquy does not alone establish that the right was not knowingly and voluntarily waived. Rather, whether the right to a jury trial was relinquished unknowingly is determined by the totality of relevant circumstance including the written waiver, the defendant's knowledge and experience with respect to jury trials and the off-the-record discussions with counsel. With respect to the claim that the jury waiver was not knowing and voluntary because of counsel's ineffectiveness, the court held that the standard is actual and not presumed prejudice. A defendant must demonstrate "a reasonable probability that the result of the waiver proceeding would have been different absent counsel's ineffectiveness; he does not have to demonstrate that the outcome of a jury trial would have been more favorable than the bench trial."¹¹⁰

104. 913 A.2d 220 (Pa. 2006).

105. 928 A.2d 215 (Pa. 2007).

106. *Commonwealth v. Garson*, 913 A.2d at 266.

107. *Commonwealth v. Rainey*, 928 A.2d at 241. The court noted that the record was not clear with respect to counsel's awareness of defendant's family background, mental problems and the extent to which he obtained medical, educational or social history records.

108. 941 A.2d 686 (Pa. 2008).

109. 888 A.2d 954 (Pa. Super 2005).

110. *Commonwealth v. Mallory*, 941 A.2d at 702-703.